

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of:	)	
	)	
Charter Communications Entertainment I, LLC	)	CSR 6916-E
	)	
Petition for Determination of Effective Competition	)	
in St. Louis, Missouri	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: July 31, 2007**

**Released: July 31, 2007**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. This case concerns whether Charter Communications Entertainment I, LLC (“Charter”), the franchised cable operator serving the City of St. Louis, Missouri (“St. Louis”), is subject to effective competition there.<sup>1</sup> The initial pleadings on the merits – in which Charter claims to show effective competition<sup>2</sup> and the government of the City of St. Louis (the “City”) opposes Charter’s claim<sup>3</sup> – were completed in 2005.<sup>4</sup> If Charter’s claim is meritorious, the City will lose authority to regulate its rates for basic cable service, retroactive to 2005.<sup>5</sup>

2. The City adopted an order regulating Charter’s rates in June of 2007.<sup>6</sup> The City’s rate order requires that Charter reduce its rates and make refunds in August.<sup>7</sup> This Memorandum Opinion and Order is prompted by Charter’s request that we stay the City’s rate order pending our ruling on Charter’s

<sup>1</sup> See generally 47 U.S.C. § 543(a)(2), (l)(1)(B); 47 C.F.R. § 76.905(b)(2).

<sup>2</sup> Petition for Special Relief (“Petition”), filed July 29, 2005; Reply to Opposition of the City of St. Louis, Missouri to Charter’s Petition for Special Relief, filed Oct. 20, 2005.

<sup>3</sup> Opposition of the City of St. Louis, Missouri to Charter’s Petition for Special Relief, filed Sept. 27, 2005.

<sup>4</sup> The exhibits filed with the Commission by Charter did not provide the list of zip codes associated with the SBCA reports. On February 23 2007, the Media Bureau requested additional information from Charter regarding its SBCA submissions. See Letter from Steven A. Broeckaert, Deputy Chief, Policy Division, Media Bureau, to Steven J. Horvitz, Esq., Davis Wright Tremaine LLP, counsel for Charter, et al., dated Feb. 23, 2007. On March 13, 2007, Charter submitted a supplement to its petition with the list of zip codes used by SBCA in preparing its subscriber report. See Letter from Steven Horvitz to Marlene H. Dortch, Commission Secretary, dated March 13, 2007. The City has not responded to the supplement.

<sup>5</sup> The Commission, when it grants a cable operator’s petition for a finding of effective competition, recognizes the filing date of the petition as the date on which the cable operator was subject to effective competition. See, e.g., *Comcast Cable of Dallas, L.P.*, 20 FCC Rcd 19282, ¶ 3 (MB 2005); *Mediacom Minnesota, LLC*, Order, 20 FCC Rcd 15687, 15688, ¶ 4 (MB 2005).

<sup>6</sup> The rate order, titled Resolution Number 83, is Attachment A to Charter’s “Request for Emergency Stay,” filed July 6, 2007 (“Request”). The City’s rate order was the end of a process that Charter had begun with a filing in October of 2006. Opposition to Request for Stay (“Opposition”), filed by the City of St. Louis on July 13, 2007, at 2.

<sup>7</sup> Resolution Number 83, ¶¶ 18, 26-27. The deliberation that led to the Resolution is contained in the lengthy Exhibits B through E to the Opposition.

effective competition claim.<sup>8</sup> The City has opposed the stay<sup>9</sup> but, for the reasons stated below, we grant Charter's requested stay.

3. The City expresses doubt about the Commission's authority to enter the stay that Charter requests.<sup>10</sup> The Commission, under the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"),<sup>11</sup> unquestionably has authority over the lawfulness of franchising authorities' decisions about rates for basic cable service.<sup>12</sup> One ground on which a franchising authority's decision about basic cable rates can be unlawful is that the cable operator has effective competition in its franchise area.<sup>13</sup> Stays of franchising authorities' rate orders have been an accepted enforcement tool since the 1992 Cable Act took effect.<sup>14</sup> It is within the Commission's enforcement authority to stay a recent rate order by a franchising authority that appears likely, as the City does here, to lose its rate authority because of effective competition in its franchise area.<sup>15</sup>

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<sup>8</sup> Request at 1.

<sup>9</sup> Opposition at 1. Two additional pleadings were filed, Charter's Motion for Leave to File Reply and Reply to Opposition to Request for Stay, filed July 16, 2007, and the City's Motion for Leave to File Surreply and Surreply Regarding Request for Stay, filed July 20, 2007. We grant both Motions.

<sup>10</sup> *Id.* at 4-5 ("Charter is asking the Bureau to issue an injunction to prevent the City from enforcing the Rate Order. But Charter has suggested no statute or rule giving the Bureau authority to issue such an injunction.") & n.3 ("The Commission does not have inherent equitable powers.").

<sup>11</sup> 47 U.S.C. §§ 521 *et seq.*

<sup>12</sup> *See* 47 U.S.C. §§ 543(a)(1) ("No . . . State may regulate the rates for the provision of cable service except to the extent provided under this section and [another section not pertinent]. Any franchising authority may regulate the rates for the provision of cable service . . . , but only to the extent provided under this section."), (b)(1):

"The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition."

*See also Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, Report & Order & Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 (1993); *First Order on Reconsideration*, Second Report & Order, & Third Notice of Proposed Rulemaking, 9 FCC Rcd 1164 (1993), *reversed in part on other grounds*, *Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996).

<sup>13</sup> 47 U.S.C. § 543(a)(2) ("If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by . . . a State or franchising authority under this section.").

<sup>14</sup> *See, e.g.*, 47 C.F.R. § 76.911(b); *Century-TCI California, L.P.*, Order, 18 FCC Rcd 18688 (MB 2003); *Comcast Cable Commun., LLC*, Order, 20 FCC Rcd 8217 (MB 2005); *TCI Cablevision of Oregon, Inc.*, Order DA 95-1047 (MB rel. May 8, 1995), available at 1995 WL 264660; *Colony Cablevision of Florida*, Memorandum Opinion & Order, 10 FCC Rcd 5144 (MB 1995).

<sup>15</sup> *See* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.") & (j) ("The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.").

## II. GROUNDS FOR STAY

4. The Commission evaluates petitions for stays under well settled principles. To win a stay, a petitioner must demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.<sup>16</sup> If the petitioner makes a strong showing of likely success on the merits, it need not make a strong showing of irreparable injury.<sup>17</sup>

5. Turning to the first criterion for granting a stay, we find that Charter is likely to prevail on the merits of its pending effective competition case.<sup>18</sup> Although the last pleading has not been filed,<sup>19</sup> it is clear from the existing record that Charter's evidence is of a type that many of our past decisions have accepted.<sup>20</sup> Charter's numerical evidence also exceeds the minimum for a Commission finding of effective competition.<sup>21</sup> Because the record in this matter is not yet complete, the City still has an opportunity to contest Charter's evidence and strengthen its own case. On the present record, however, we find that Charter is likely to prevail on the merits of its request to be found subject to effective competition in St. Louis.

6. The second criterion we must consider is whether Charter will suffer irreparable harm in the absence of a stay. Charter claims that the City's rate order will reduce its revenues and fears that it may not be able to recoup those losses through a later surcharge because subscribers will cancel its service when they face the surcharge.<sup>22</sup> We agree with the City that Charter's fear is questionable.<sup>23</sup> Charter has not shown that, after it raised its rates, it would not retain enough customers to recoup its losses.<sup>24</sup> Charter has not made a strong showing that it will suffer irreparable harm in the absence of a stay.

7. The third criterion we must consider is whether other interested parties would be harmed if a stay is granted. The other interested parties in this case are subscribers to Charter's basic service. As the City notes, they will pay higher rates if we grant a stay,<sup>25</sup> rates that the City's recent rate order found unlawfully high.<sup>26</sup> That point falls, however, before the likelihood that the City lacked the legal authority to adopt that decision. There is nothing unlawful about Charter's rates under the 1992 Cable Act if the City lacked the authority to find them unlawful because of the existence of effective competition.

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<sup>16</sup> *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

<sup>17</sup> *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("Probability of success is inversely proportional to the degree of irreparable injury evidenced. A stay may be granted with either a high probability of success and some injury, or *vice versa*.").

<sup>18</sup> Request at 4-5; Opposition at 6-7.

<sup>19</sup> See *supra* note 4.

<sup>20</sup> That evidence is advertisements in print media and data from the 2000 Census and the Satellite Broadcasting and Communications Association. See, e.g., *Mediacom Minnesota LLC*, Memorandum Opinion & Order DA 07-3193 (MB rel. July 13, 2007), available at 2007 WL 2026757.

<sup>21</sup> Compare authorities cited *supra* note 1 (requiring a market share in excess of 15% for satellite-based providers) with Petition at 6-7 (showing those providers with a 16.8% market share).

<sup>22</sup> Request at 6-7.

<sup>23</sup> Opposition at 7-8.

<sup>24</sup> The Petition's evidence indicates that over 80% of the households in St. Louis subscribe to its cable service. Petition at 6-7.

<sup>25</sup> Opposition at 9.

<sup>26</sup> *Id.* at 1-5.

8. Also, Charter has promised, consistent with our precedent,<sup>27</sup> to make refunds with interest if we grant its requested stay and later conclude that it is not subject to effective competition.<sup>28</sup> The City has noted the importance of this protection for Charter's subscribers,<sup>29</sup> and we agree. We intend to rule on the merits of Charter's request for a finding of effective competition promptly. Therefore, if we ultimately deny Charter's request, any stay is likely to be short-lived and any harms it causes to other interested parties will be slight. For all these reasons, we conclude that other interested parties will not be harmed by the grant of a stay.

9. Finally, we must consider whether the public interest favors granting a stay.<sup>30</sup> In light of our finding that Charter will likely prevail on the ultimate issue of effective competition, continued rate regulation by the City, followed by Charter's attempt to recoup its losses, would waste the time and energy of both the City and Charter. The cost of such waste would ultimately be borne by the City's taxpayers and Charter's subscribers. The public interest counsels against such waste.

10. In sum, Charter has made convincing showings on the latter two factors, and its showing of likely success on the merits outweighs its less powerful showing of irreparable injury. On the whole, we conclude that Charter has satisfied the requirements for a stay.

### III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the Request for Emergency Stay filed by Charter Communications Entertainment I, LLC, on July 6, 2007, **IS GRANTED**, pending the resolution of the Petition for Special Relief herein.

12. **IT IS FURTHER ORDERED** that the stay entered by this Memorandum Opinion and Order **SHALL TERMINATE** upon the release of the Commission decision resolving the Petition for Special Relief herein.

13. **IT IS FURTHER ORDERED** that Charter and the City **SHALL AGREE** on a mutually satisfactory method of escrow or security to effect, in the event that the Petition for Special Relief herein is denied, the rate reductions and refunds ordered in the City's Resolution No. 83.<sup>31</sup>

14. This action is taken pursuant to authority delegated by section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton  
Deputy Chief  
Policy Division  
Media Bureau

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<sup>27</sup> *Comcast Cable Communications, LLC*, Order, 20 FCC Rcd 8218, 8219, ¶ 3, 8219, ¶ 8 (MB 2005); *TCI Cablevision of Oregon, Inc.*, Order DA 95-1047 at ¶¶ 5, 7 (CSB rel. May 8, 1995).

<sup>28</sup> Request at 7.

<sup>29</sup> Opposition at ii, 3.

<sup>30</sup> Request at 7-8 (arguing that Charter should not be penalized for the long pendency of its request to be found subject to effective competition); Opposition at 9-10 (arguing that subscribers should not have to pay unlawfully high rates).

<sup>31</sup> We commend to the parties' attention the arrangements made in the cases cited in n.27, *supra*.